



MONTGOMERY COUNTY ETHICS COMMISSION

Steven Rosen
Chair

Kenita V. Barrow
Vice Chair

July 5, 2017

Advisory Opinion 17-06-007

You inquired whether your Department may, consistent with Public Ethics Law requirements, enter into a contract with a former employee of the Department to work as a “contract Program Manager” in Central Operations, Division of Solid Waste Services, Department of Environmental Protection. The individual you seek to be the contract Program Manager previously served the Department as a Senior Engineer working on the same project that you would have him serving as the contract Program Manager.

Section 19A-13(a) of the Montgomery County Public Ethics Law provides that:

A former public employee must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter if the employee significantly participated in the matter as a public employee.¹

The person sought for the position of contract Program Manager separated from County service in 2013. The Department seeks to use an Intergovernmental Agreement with the Maryland Environmental Service (MES) to hire the individual from the engineering firm with which he is associated. MES is an instrumentality of the State of Maryland that carries out essential governmental functions. The MES will not profit from the arrangement for services of the individual to the County.

The question from an ethics standpoint is whether, through the contemplated arrangement, the former public employee would be “assist[ing] any party, other than a County agency. . .” or whether, instead, the contract Program Manager position is only to “assist a County agency” under 19A-13(a). Assuming the other elements of 19A-13(a) would be met, the former is prohibited while the latter would be permissible.

¹ Pursuant to 19A-13(c), significant participation means “making a decision, approval, disapproval, recommendation, rendering of advice, investigation, or similar action taken as an officer or employee. Significant participation ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.” Addressing whether the activities of the individual constituted significant participation in a specific matter is unnecessary due to the Commission’s conclusion that the prohibition of 19A-13(a) does not apply.

As a starting point, the County may directly contract with former employees for personal services. Where the contract is between the County and the former employee directly and not through an organized business entity, the former employee would not be “assist[ing] any party.” Assistance to a party does not mean assistance to oneself; by its nature, assistance is to others. While a former employee could be “a party”, “assist[ing] any party” means providing help or advice to a third person or entity, not the former employee.

The issue here is whether a former employee is “assisting” a third party or is “assisting” the County where, at the request of and at the convenience of the County, the contract between the third party and the County is the vehicle pursuant to which the former employee will provide personal services to the County.

In a certain sense, any contract the County enters into is for “assistance” to the County as the County pursues its objectives. In most contracts, while there is an alignment between the County’s interests and those of the contractor, the interests are not identical. The contractor is subject to meeting the terms and requirements of the contract, with performance being monitored by County contract officials. In the instance of a personal services contract where an individual is being hired to be a “contract Program Manager”, the services expected are like those of a County employee and the work is for a County agency. Under such a contract, the person providing services would not be entitled to benefits or merit status as a County employee, but would be subject to contract terms for meeting service requirements.

Under these circumstances, some of the conduct that 19A-13(a) aims to prevent is not implicated. Section 19A-13(a) is aimed at preventing, at least in part, “switching sides” where a party other than the County is able to take advantage of the special knowledge acquired in the context of an employee’s County employment and use it for private advantage. A former employee who participated significantly in a matter could use the knowledge learned while an employee to leverage an advantage for a new employer against the interests of the government or even third parties. Where a former employee will be providing contract-employee services to the Government on matters on which the former employee used to work, there is little risk of the knowledge being leveraged for the benefit of third parties. Here, as MES will not be profiting from the arrangement, there appears to be no risk of information being leveraged to the advantage of another party.

To emphasize the notion that the contract is to assist the County, the requestor has described that due to several personnel changes in the department, the requestor is in substantial need of the expertise of the former employee. The arrangement with MES is for the convenience of the government in using the existing Intergovernmental Agreement vehicle to bring the individual in to serve the County.

Under the circumstances presented, the Ethics Commission finds that the work being done is to assist the County and no other party and, therefore, falls outside the scope of 19A-13(a). This opinion is limited to the facts presented by the requestor. Furthermore, the opinion does not address the propriety of or extent to which County agencies may use contracts to obtain personal services to the County in lieu of hiring employees pursuant to the merit system, as that is a matter that is beyond the jurisdiction of the Commission.

For the Commission:



Steven Rosen, Chair